IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-1236 and 77-1269

GENERAL ATOMIC COMPANY,
Petitioner,

v.

EDWIN L. FELTER, ETC., ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the Supreme Court of New Mexico

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BRIEF FOR RESPONDENT UNITED NUCLEAR CORPORATION IN OPPOSITION

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The petitions in Nos. 77-1236 and 77-1269 concern related orders in the trial court and related petitions for extraordinary writs in the New Mexico Supreme Court. Accordingly, United Nuclear Corporation, a respondent pursuant to Supreme Court Rule 21(4), is filing this single brief in opposition to the two petitions.[1]

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[1] Petitioner has also filed a petition for writ of mandamus, with accompanying motion, in No. 77-1237. Though the petition in No. 77-1269 states that it is supplementing that motion and petition as well as the petition in No. 77-1236, the subject of the petition for writ of mandamus is sufficiently distinct that UNC is responding in a separate brief in opposition.

OPINIONS BELOW

In addition to the opinions and orders cited in the petitions, the New Mexico District Court entered an Amended Sanctions Order and Default Judgment on March 27, 1978, in response to petitioner's motion for, *inter alia*, reconsideration of the Sanctions Order and Default Judgment that is a subject of the petition in No. 77-1269 (Pet. No. 77-1269 App. 2a); the March 27 order appears in the Appendix, *infra*, at 1a. The District Court's further order of March 27 that, *inter alia*, denied the motion for reconsideration except to the extent reflected in the Amended Sanctions Order and Default Judgment, appears in the Appendix, *infra*, at 23a. On April 4, 1978, the District Court entered a Declaratory Judgment as to Issues between United Nuclear Corporation and General Atomic Company, based upon the Amended Sanctions Order and Default Judgment, which Declaratory Judgment was entered as a final judgment pursuant to Rule 54(b)(1) of the New Mexico Rules of Civil Procedure so as to facilitate an immediate appeal. The Declaratory Judgment appears in the Appendix, *infra*, at 25a. None of these orders is reported.

QUESTIONS PRESENTED

(1) Whether this Court should review a State Supreme Court's denial, without opinion, of a petition for extraordinary writ of mandamus and prohibition requesting it to vacate an interlocutory discovery order that has been superseded by a subsequent sanctions order and default judgment and, thereafter, by a final declaratory judgment.

(2) Whether the State Supreme Court's denial, without opinion, of a petition for extraordinary writ of mandamus and prohibition rested upon an independent and adequate state ground.

(3) Whether a state trial court may, consistent with the Constitution and the act of state doctrine, enter a discovery order for the identification of relevant documents located in a foreign country, when the party subject to that order questions the lawfulness of such identification under a law of the foreign country.

(4) Whether a State Supreme Court is required by the Due Process Clause of the Fourteenth Amendment to issue an extraordinary writ directing a state trial court to submit for review any order it might enter imposing sanctions for violations of discovery orders, prior to the entry of such an order.

(5) Whether this Court should review, by common law writ of certiorari, a sanctions order and default judgment entered by a state trial judge for violation of discovery orders, when that order has not yet been reviewed by direct appeal to any State appellate court.

STATEMENT

The underlying state proceeding in this case is a suit by respondent United Nuclear Corporation ("UNC") against petitioner General Atomic Company ("GAC") in the District Court for the State of New Mexico, First Judicial District, Santa Fe County, for damages and for a declaratory judgment that certain contracts providing that UNC supply GAC with uranium are void under the common law and statutory law of the State.

The complaint was filed in December 1975, and trial commenced on October 31, 1977. Default judgments on all issues except damages were entered against GAC and in favor of UNC and the Indiana & Michigan Electric Company ("I&M")[2] on March 2, 1978 (Pet. No. 77-1269

[2] I&M is a party defendant and cross-claimant against GAC. I&M is also filing a brief in opposition to these petitions, with which UNC generally agrees.

App. 2a), and amended on March 27, 1978 (App., *infra*, 1a). Final declaratory judgment as to issues between UNC and GAC was entered on April 4, 1978 (*id.* 25a). Trial is continuing on the issue of damages; UNC has a net claim of approximately $200,000.

GAC's first petition (No. 77-1236) seeks a writ of certiorari to review a January 11, 1978 order of the New Mexico Supreme Court denying, without opinion, a GAC petition for writ of mandamus and prohibition under that court's constitutional "power of superintending control" over inferior courts. (Pet. No. 77-1236 App. 1a.) That petition sought review, through extraordinary writ, of an interlocutory discovery order entered on November 18, 1977 (*id.* App. 2a-5a), now superseded by the Sanctions Order and Default Judgment of March 2, 1978 (Pet. No. 77-1269 App. 2a), as amended on March 27 (App., *infra*, 1a), and by the final declaratory judgment of April 4, 1978 (App., *infra*, 25a).

GAC's second petition (No. 77-1269) seeks a writ of certiorari to review a March 2, 1978 order of the New Mexico Supreme Court denying, again without opinion, a motion by GAC. That motion sought reconsideration of the order of January 11, 1978, and sought to impose a requirement that the District Court certify to the State Supreme Court any proposed sanctions order prior to entry by the District Court. (Pet. No. 77-1269 App. 1a.) It also purports to seek a common law writ of certiorari, pursuant to 28 U.S.C. § 1651, to review the Sanctions Order and Default Judgment entered by the District Court on March 2, 1978, and amended on March 27, after the filing of the petition in No. 77-1269.

GAC's two petitions contain lengthy descriptions of the proceedings in the trial court and statements about the course of litigation.[3] It should be noted, however, that no

[3] GAC's petitions contain a number of allegations that we consider to be inaccurate and misleading and unfairly disparaging of the trial judge's conduct of the proceedings. By declining to address each such allegation and unduly lengthen this brief, we do not wish to be understood to accede to any part of GAC's portrait of the proceedings below.

record was filed in the New Mexico Supreme Court. The only presently effective findings of fact by any court in this action are those in the District Court's Sanctions Order and Default Judgment of March 2, 1978, as amended on March 27. While GAC disagrees with many of those findings (Pet. No. 77-1269 at 12), it concedes that they "will first have to be reviewed, upon a careful consideration of the full record, in the New Mexico appellate courts." *Id.* Those findings, in other words, must be taken as true in this Court's consideration of GAC's petition for writs of certiorari. Accordingly, the following description of the proceedings below incorporates relevant facts in the Recitals of the Amended Sanctions Order and Default Judgment.

A. Early Discovery Proceedings

UNC's complaint in December 1975 alleged, among other things, that a 1973 uranium supply agreement was void as a result of fraud, economic coercion, breach of fiduciary duties,[4] and violations of the New Mexico antitrust laws. Further, UNC claimed that performance of the agreement was excused because it was commercially impracticable.[5] UNC simultaneously served its first set of interrogatories on GAC, seeking information relating to "negotiations" and "agreements" pertaining to the "marketing and sale" of uranium. The interrogatories specifically requested information from the constituent part-

[4] From 1971 to 1973, UNC and Gulf Oil Corporation were co-owners of a joint venture corporation known as Gulf United Nuclear Fuels Corp.

[5] In April 1976, the complaint was amended to include claims that a 1974 agreement between UNC and GAC was void upon similar grounds.

ners of GAC, Gulf Oil Corporation ("Gulf") and Scallop Nuclear, Inc. Recitals 1, 2, App., *infra*, 3a.

Although it received an extension of time, GAC failed timely to answer or object to the interrogatories, and in March 1976 UNC filed its first application for a default judgment. The parties thereupon entered into an agreement signed by counsel for UNC, GAC and Gulf, in which UNC agreed to withdraw its application for default judgment and GAC agreed to "answer in good faith all interrogatories to Defendant presently pending in this action" and to produce documents. Recital 3, App., *infra*, 4a. Yet on April 2, 1976, GAC filed "wholly inadequate and evasive answers to the Interrogatories" and failed to produce relevant documents. Recital 5, *id.* 4a-5a. On August 6, 1976, UNC filed a second motion for default, based on the discovery failures. Although that motion was denied, the court warned the parties that it would impose sanctions should any party fail to make discovery in good faith. Recitals 8, 11, *id.* 5a, 6a.

GAC suggests that it was not until a year later, in August 1977, that it was put on notice that UNC sought the production of certain documents of GAC and Gulf that related to the participation of GAC and Gulf in an international uranium cartel that fixed prices, allocated markets, and discriminated against middlemen, in the United States and elsewhere. See Pet. No. 77-1236 at 4, 5.[6] The District Court, however, has repeatedly ruled to the contrary, finding that the cartel documents were indeed covered by the first set of interrogatories and the

[6] GAC states that "[t]he alleged 'international cartel' was in fact an international uranium marketing arrangement *established and enforced* by foreign governments, including the Government of Canada." Pet. No. 77-1236 at 4 (emphasis added.) This characterization is contrary to the findings of fact entered as a sanction in this action (Finding 2, App., *infra*, 18a) and is contrary to the evidence before the District Court.

March 1976 agreement to produce. Recitals 4, 44, App., *infra*, 4a, 16a.

Although GAC represented under oath on April 2, 1976, that the business records of Gulf and Scallop would be produced on June 20, 1976 (Recital 5, App., *infra*, 4a-5a), and the District Court held on April 30, 1976, that the parties were bound by the March 1976 discovery agreement (Recital 6, *id.* 5a), GAC continued to fail to answer or to produce cartel documents covered by the first set of interrogatories and by the March agreement. Rather, GAC "deliberately concealed the existence of evidence which it knew to be highly relevant to the antitrust issues pleaded in UNC's Complaint and stressed by counsel throughout the discovery period.' Recital 10, *id.* 6a. This "intentional and willful action, * * * a violation of UNC's discovery rights and the Orders" of the District Court (*id.*), occurred prior to the adoption of the Uranium Security Regulations by Canada on September 23, 1976 (Recital 9, *id.* 5a), at times when "no law of the United States or Canada prohibited" production of the cartel documents (Recital 4, *id.* 4a).

In August 1977, UNC served a second set of interrogatories specifically designed to elicit all facts about the cartel. A motion to produce all documents identified in the answers to those interrogatories was filed at the same time, and GAC agreed to produce those documents. After an extension of time, the greater portion of GAC's answers to the interrogatories was adjudged "defective, incomplete, inadequate and unacceptable." Order of October 11, 1977, Pet. No. 77-1236 App. 28a, 29a; Recitals 14, 15, App., *infra*, 7a.

This October 11 order also responded to GAC's contention that release or disclosure of the requested cartel documents, to the extent that those documents were then housed in Canada, would violate the Canadian Uranium Information Security Regulations, promulgated on Sep-

tember 23, 1976, some nine months after UNC's first set of interrogatories.[7] The order required GAC to "clearly and definitively identify all documents," whether or not housed in Canada, but required production of requested documents only "[i]nsofar as it is lawful so to do." It further directed GAC to make "an immediate diligent and good faith effort" to obtain a lawful waiver or dispensation if Canadian regulations prohibited production of Canadian documents. Order of October 11, 1977, Pet. No. 77-1236 App. 32a-33a. Finally, the order reiterated a warning given on several earlier occasions (Recital 11, App., *infra*, 6a) that failure to make full compliance with discovery orders would subject any party to sanctions under Rule 37 of the New Mexico Rules of Civil Procedure, which is substantially similar to Federal Rule 37.

B. The November 18, 1977 Discovery Order

In a second set of answers, filed October 20, 1977, to the second set of interrogatories GAC refused again to identify or produce cartel documents located in Canada. Recital 16, App., *infra*, 7a. UNC moved again, on November 4, 1977, for an order compelling identification of the documents and for a sanctions order, finding all facts provable from the documents against GAC. In response, and after an evidentiary hearing on November 14 and 16, the District Court issued the November 18, 1977 order that was the subject of GAC's January 5, 1978 petition for an extraordinary writ in the New Mexico Supreme Court. Although GAC states that, prior to this order, it "tried in good faith to secure a waiver with respect to the documents" located in Canada, Pet. No. 77-1236 at 7, the District Court found that the terms of its October 11 order "were not performed or complied with but rather they were sought to be avoided." *Id.* App. 3a; see also Recital 27, App., *infra*, 12a. Moreover, GAC's

[7] The regulations appear at Pet. No. 77-1269 App. 86a.

failure to produce was "caused in part, by its own early and deliberate policy of housing such documents in Canada * * *." Pet. No. 77-1236 App. 3a.

The November 18, 1977 order again required that GAC "identify, clearly and definitively, all documents housed in Canada." Pet. No. 77-1236 App. 4a. The order next stated:

> "All facts provable from documents housed in Canada which are not produced and which are the subject of said motion are found against Defendant, [GAC,] and said defendant is precluded from offering evidence herein in opposition to such findings of fact; subject, however, to the other provisions of this order." *Id.*

The remainder of the order set a briefing schedule for proposed findings of fact to be determined on the basis of nonproduction of the cartel documents.

C. The December 27, 1977 Discovery Orders

GAC moved to vacate the November 18, 1977 discovery order, primarily on the basis of the "personal opinion" of a Canadian Minister given in a written response to a letter from GAC. GAC relied on this opinion even though it knew that the Minister had "been determined by the courts of Canada to have no authority to interpret or deal with the Uranium Security Regulations." Recital 28, App., *infra*, 12a. Two diplomatic notes from the Government of Canada were also transmitted to the District Court by the Department of State. Pet. No. 77-1236 App. 8a-12a. It should be noted, however, that the Department of State stated that, in transmitting the views of the Canadian Government, it was taking

> "no position with regard to any of the issues raised in either of the two notes. Transmittal of these documents should not be understood as having implica-

tions with respect to the foreign affairs of the United States." *Id.* App. 8a.

On December 27, 1977, the District Court denied GAC's motion to vacate the November 18 order. Pet. No. 77-1236 App. 44a-46a. The court noted that that order had not required "anything of any foreign sovereign or of any person of [*sic*] any act in violation of any laws of a foreign sovereign." *Id.* App. 45a. "Alternatively," however, it went on to say:

> "should identification of the aforesaid documents housed in Canada, *at this time* be deemed to constitute a violation of Canadian law, which premise has not been shown to the satisfaction of this Court, still the order of November 18, 1977 must stand as the predicate to appropriate relief under Rule 37 of the Rules of Civil Procedure * * *." *Id.* (emphasis in original).

In a second order on December 27, in response to a motion by I&M to compel further answers to UNC's second set of interrogatories, the District Court again directed GAC to answer "completely, in good faith, and without evasion," and warned GAC that, if it failed or refused to comply, any aggrieved party could apply for appropriate sanctions under Rule 37. Recital 18, App., *infra*, 7a-8a.

D. GAC's Petition for Extraordinary Writ in the New Mexico Supreme Court

On January 5, 1978, GAC filed in the New Mexico Supreme Court a petition for writ of mandamus and prohibition under that court's constitutional power of "superintending control over all inferior courts" (hereinafter "N.M. Pet."). N.M. Const., Art. VI, § 3. The petition urged that the November 18, 1977 discovery order required violation of Canadian law; raised "questions of the jurisdiction of a state court to impose sanctions for non-production" of the documents in question; unconstitutionally interfered with the conduct of United States foreign relations; and departed from the act of state doctrine. N.M. Pet. 6-9.

GAC requested (a) an "alternative writ" of mandamus and prohibition directing the trial judge to vacate the November 18 order or to show cause why that order should not be vacated;[8] (b) an immediate stay of proceedings in trial court "pending final disposition of this petition"; and (c) an order that the record and briefs on the merits be filed in the Supreme Court. *Id.* 33-34, and accompanying proposed alternative writ.

The petition was argued to the New Mexico Supreme Court on January 11, 1978. During argument, counsel for GAC acknowledged that it was "most unusual" for the Court to exercise its power of superintending control, adding: "I think the Court has only done this five times in the history of the Court * * *." Tr. 1/11/78 at 68. That same day, the Court denied GAC's petition without opinion. Pet. No. 77-1236 App. 1a. This denial is the subject of GAC's petition for writ of certiorari in this Court in No. 77-1236.

E. GAC's Application for a Stay of Trial Court Proceedings

On January 26, 1978, GAC filed a "motion for stay of proceedings" in the New Mexico Supreme Court, asking it to stay proceedings in the trial court pending resort by GAC to this Court or, in the alternative, to stay entry of any findings of fact as a sanction pending further orders of the New Mexico Supreme Court.

After argument on February 1, 1978, the New Mexico Supreme Court denied the motion but further ordered:

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[8] Under New Mexico prc edure, an "alternative writ" ordinarily orders the trial judge either to perform certain acts or to show cause why he should not be required to do so by a "permanent writ." Thus an "alternative writ" is the functional equivalent of a show cause order directed to the trial judge.

"that the trial court be and the same is hereby directed to allow the parties sufficient time prior to the entry of any order or findings of fact based upon its order of November 16 [*sic*], 1977 * * * to present to this Court additional motions as may be appropriate." Pet. No. 77-1269 App. 29a-30a.

F. Further Proceedings in Trial Court on Motion for Sanctions and Default Judgment

On February 2, 1978, after two extensions of time, GAC filed its third set of answers to UNC's second set of interrogatories. These answers were found to be "unresponsive and evasive," and "mere legal argument" in many instances. In addition, they violated the express terms of the order of October 11, 1977, in that GAC refused to commit itself to a set of facts even when documents were available to the parties. See Recitals 19-20, App., *infra*, 8a. In addition, in the face of its continuing obligation to produce relevant documents and even though the trial was in progress, GAC did not produce certain cartel documents located in the United States or reveal their existence to the court or the parties until UNC discovered their existence from other sources. Recitals 22-23NA, App., *infra*, 9a-11a.

Accordingly, on February 10, UNC moved again for default judgment, based on the accumulated violations of discovery orders. Pursuant to the November 18 order, the parties filed on February 15 more than 800 pages of briefs regarding UNC's proposed findings of fact.

On February 16, 1978, in keeping with the February 1, 1978 order of the New Mexico Supreme Court, the District Court issued a Notice (Pet. No. 77-1236 App. 51a) that it would act upon all pending motions on or after March 1, 1978, and that the court would, at that time, "enter such orders, findings, sanctions or judgments, or granting or denial or deferment of such motions, as to the Court then appears to be just and lawful." It added

that before any action would be taken on such motions, "and in keeping with the aforesaid mandate of the New Mexico Supreme Court, all parties to this case are allowed time until and including February 28, 1978, within which to file in the New Mexico Supreme Court, any additional motions they may deem proper." *Id.* App. 52a.

G. GAC's Motion for Stay, Certification, and Reconsideration in the New Mexico Supreme Court

GAC seized the opportunity offered and, on February 20, 1978, filed an unverified motion in the proceeding it had earlier initiated in the New Mexico Supreme Court by its January 5 petition. That motion sought partial reconsideration of the denial of the earlier petition and issuance of an alternative writ of mandamus and prohibition (a) staying the entry of any findings of fact or other sanctions against GAC until further order of the State Supreme Court, and (b) directing the trial judge to certify to the court, prior to entry, any proposed findings of fact or other sanctions that he intended to enter, so that the November 18 interlocutory order, "as amplified by such findings or other sanctions as may be certified to this Court," could be reviewed. GAC's proposed alternative writ would have directed the filing of a record and a briefing schedule. The only new matter presented was the argument that the trial judge had violated the New Mexico Supreme Court order of February 1, 1978, by not affording GAC a preview of any findings of fact or other sanctions that he intended to enter.

After oral argument on March 1, 1978, the New Mexico Supreme Court denied GAC's latest motion, without opinion, on March 2, 1978. Pet. No. 77-1269 App. 1a. This denial is the subject of GAC's petition for writ of certiorari in No. 77-1269.

H. The Sanctions Order and Default Judgment

On March 2, 1978, shortly after it learned that the New Mexico Supreme Court had denied GAC's motion, the

District Court entered a Sanctions Order and Default Judgment. Pet. No. 77-1269 App. 2a. The Court ruled that GAC had

> "followed a conscious, willful and deliberate policy throughout this litigation, which continues to the present time, in cynical disregard and disdain of the Rules of Procedure relating to discovery and this Court's discovery Orders, of concealing rather than in good faith revealing the true facts concerning the international uranium cartel * * *." *Id.* App. 2a-3a.

The factual basis for imposing sanctions under Rule 37 of the New Mexico Rules of Civil Procedure (*id.* App. 90a) was set forth in 44 recitals.

The recitals set forth the court's findings about the two-year history of GAC's discovery failures, in more detail than we have attempted herein. They find that GAC never informed the parties about the cartel, about Gulf's and GAC's participation therein, or about cartel documents, even though such disclosure was required long prior to the promulgation of the Canadian Uranium Security Regulations on September 23, 1976, long after such discovery was required. Recitals 4, 9, 24, 44-45, *id.* App. 5a, 6a, 10a, 16a-17a. The recitals also set forth GAC's refusals to produce domestic and foreign documents and to answer interrogatories, and its concealment of the existence of evidence, all in violation of outstanding discovery orders. Recitals 1-24, *id.* App. 4a-11a.

> "Based on all facts, the Court is forced to conclude, therefore, that GAC has followed a consistent pattern and practice of concealing, rather than revealing, highly relevant documents to the Court and to the parties here, and that such actions and practices have been contumacious, intentional, willful, deliberate and, in the utmost bad faith." *Id.* App. 11a.

The recitals also set forth the inadequacy of GAC's steps to comply with the court's orders that documents be produced or identified, if possible under Canadian law, Recitals 26-35, *id.* App. 12a-15a, and they find that

"GAC's actions demonstrate its actual intent to conceal the documentary evidence concerning the cartel rather than to produce it in good faith to the parties in this litigation and the Court." *Id.* App. 15a. They find, finally, that Gulf "followed a conscious and deliberate policy of housing the cartel documents in Canada," action that "amounts to deliberately courting or seeking legal impediments to the production of the records." *Id.* App. 15a-16a.

The District Court also entered twelve findings of fact as sanctions, to the effect, *inter alia*, that Gulf and GAC participated in an international uranium cartel from at least 1972 to 1975, the purpose and effect of which was to limit the supply, control production, allocate markets, and fix the price of uranium; that neither GAC nor Gulf and its subsidiaries were compelled by the Canadian Government to belong to the cartel; that Gulf and its subsidiaries and affiliates, pursuant to a cartel agreement, restricted production of uranium in New Mexico and monopolized New Mexico uranium reserves; that the uranium supply contracts with UNC were entered into by Gulf and GAC as part of an attempt to monopolize New Mexico uranium reserves; and that Gulf and GAC breached fiduciary duties owed to UNC. *Id.* App. 17a-21a.

The District Court ordered that judgment by default, except on the issue of damages, be entered against GAC in favor of UNC and I&M; that GAC's defenses and its counterclaim and crossclaim be stricken; and that the trial continue on the issue of damages.

This order is the subject of the request for common law writ of certiorari to the trial court incorporated in the petition for writ of certiorari in No. 77-1269. Pet. No. 77-1269 at 16.

I. Proceedings After March 2, 1978

On March 3, 1978, GAC filed its petition for writ of certiorari in No. 77-1236 and its petition for writ of

mandamus in No. 77-1237 (to which UNC is responding in a separate brief). At the same time, GAC filed in this Court an application to stay proceedings in the District Court (No. A-747), which was denied on March 20, 1978.

In the meantime, on March 13, 1978, GAC filed a motion in the District Court seeking reconsideration of the March 2 Sanctions Order and Default Judgment, or, alternatively, clarification thereof, or, as a final alternative, the amendment of that order so as to make it immediately appealable under Rule 54(b) of the New Mexico Rules of Civil Procedure (similar to Federal Rule 54(b)) and a stay of the trial on damages pending appeal.[9]

While this motion was pending, GAC filed, on March 15, 1978, the petition for writ of certiorari in No. 77-1269. On March 27, 1978, the District Court entered an Amended Sanctions Order and Default Judgment, correcting and amending several recitals. App., *infra*, 1a.[10] GAC's other requests for reconsideration, clarification, and stay were denied, except that the court reserved ruling on the request for the entry of a Rule 54(b) judgment. App., *infra*, 23a. On April 4, 1978, the District Court entered a final declaratory judgment as to all issues, except damages, between UNC and GAC pursuant to Rule 54(b). App., *infra*, 25a.

As of this writing GAC has not sought review of the Amended Sanctions Order and Default Judgment or the Declaratory Judgment in the New Mexico appellate courts. GAC has until May 4, 1978, to appeal.

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[9] The motion is attached to I&M's supplemental memorandum in opposition to GAC's application for a stay in No. A-747.

[10] For the most significant amendments, see Recitals 23-A, 24, App., *infra*, 10a-11a.

ARGUMENT

Both of GAC's petitions for writs of certiorari seek review of the refusals of the New Mexico Supreme Court to review—prior to the entry of any sanctions order—the November 18, 1977 interlocutory discovery order, which merely looked forward to the entry of sanctions and which has since been superseded by the Amended Sanctions Order and Default Judgment and the Declaratory Judgment based thereon. Even assuming that the actions of the New Mexico Supreme Court on January 11, 1978, and on March 2, 1978, are "final decisions" within the meaning of 28 U.S.C. § 1257,[11] both of those actions rested upon independent and adequate nonfederal grounds, so that no federal question is properly presented to this Court for review. Furthermore, the petitions present no substantial federal question, and the orders sought

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[11] This Court has stated that a suit for a writ of prohibition in a state appellate court is "an independent suit," *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 565 (1947), or "a distinct suit," *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 14 (1931), and that "the judgment finally disposing of it is a final judgment within the meaning of [§ 1257]," *id.* However, as a leading treatise states, "it might seem a perversion of the final judgment rule to allow the formally independent nature of extraordinary state collateral proceedings to establish finality. * * * If the same questions had been raised by interlocutory state appeal, review would have been denied." Wright, Miller, Cooper & Gressman, Federal Practice & Procedure: Jurisdiction § 4009 at 580 (1977). The petitions do not show that the New Mexico Supreme Court's actions fall within any of the four categories of decisions that may be final according to the pragmatic criteria recently enunciated in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-487 (1975). Nor do GAC's arguments against the November 18, 1977 interlocutory discovery order really go to the jurisdiction of the trial court to enter the order. Compare *Madruga* v. *Superior Court*, 346 U.S. 556, 557 n. 1 (1954), and *Fisher* v. *District Court*, 424 U.S. 382, 385 n. 7 (1976), the cases relied on by petitioner. Pet. No. 77-1236 at 16-17. It does not seem necessary to brief this jurisdictional question in detail, however, in view of the strength of the other grounds for denying the petitions.

to be reviewed are not in conflict with decisions of this Court or of the federal courts of appeals.

A. The Decisions of the New Mexico Supreme Court Rest on Independent and Adequate Nonfederal Grounds

The New Mexico Supreme Court concisely summarized New Mexico law on extraordinary writs of prohibition in an earlier proceeding in this case:

> "Prohibition is an extraordinary remedy which is granted only in limited circumstances at the discretion of the Court and is properly invoked to prevent an inferior court from acting either without jurisdiction or in excess of its jurisdiction. [Citations omitted.] This writ should be issued sparingly and only where irreparable harm, extraordinary hardship, costly delays, or unusual burdens of expense would result. [Citations omitted.] Prohibition, however, is not a substitute for an appeal nor can it be used merely to correct an erroneous decision of the district court. [Citations omitted.]" *General Atomic Company* v. *Felter*, 90 N.M. 120, 560 P.2d 541, 543 (1977), *reversed on other grounds*, 434 U.S. —— (Oct. 31, 1977) (No. 76-1640).

By its January 5, 1978 petition to the New Mexico Supreme Court, GAC asked that court to exercise its discretion and issue an alternative writ—similar to a show cause order—to the District Court (see p. 11, n.8, *supra*). Such action would have resulted in the filing of a record and briefs in the State Supreme Court on the issues in the petition concerning the validity of the November 18, 1977 order. UNC argued, among other things, that review of that order by extraordinary writ was inappropriate because, under New Mexico procedures, GAC had a remedy by appeal; it had not been irreparably injured; the order was purely interlocutory; GAC had never contended that the order was in excess of the trial court's jurisdiction; and factual issues not appropriate for review by extraordinary writ were involved. The New Mexico Supreme Court denied GAC's petition, without opinion, on January 11, 1978. As a result, no record was filed in the State Supreme Court, and there was no plenary briefing of the issues.

Accordingly, there is no reasonable likelihood that the action of the New Mexico Supreme Court that is the subject of the petition in No. 77-1236 rested on the rejection, on the merits, of any federal claim that GAC attempted to present. Although GAC's substantive arguments to the New Mexico Supreme Court were phrased as attacks on the jurisdiction of the state trial court to issue the discovery order, in fact they were claims only that the trial court erred, since its discovery order was issued under the New Mexico Rules of Civil Procedure in a case over which it has unquestioned jurisdiction. GAC's contention that the discovery order, or the sanctions order and default judgment that followed it, was in error are reviewable on direct appeal after a final judgment,[12] and GAC has never suggested the contrary.

In these circumstances, the traditional rule fully applies: "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." *Durley* v. *Mayo*, 351 U.S. 277, 281 (1956), quoting *Stembridge* v. *Georgia*, 343 U.S. 541, 547 (1952) (emphasis in original). See also *Williams* v. *Kaiser*, 323 U.S. 471, 477-78 (1945).[13]

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[12] Such an appealable final judgment, by virtue of a Rule 54(b) certification, was entered on April 4, 1978. App., *infra*, 25a.

[13] This case was previously before this Court on petition for writ of certiorari seeking review of another denial, without opinion, of an extraordinary writ by the New Mexico Supreme Court. This Court granted the writ of certiorari, and remanded to the State Supreme Court "to consider whether judgment is based upon federal or state grounds, or both." *General Atomic Company* v. *Felter*, 429 U.S. 973 (1976) (No. 76-385). On remand, the State Supreme

Nor is there any greater likelihood that the action of the New Mexico Supreme Court on March 2, 1978, that is the subject of the petition in No. 77-1269, rested on any federal ground. Besides asking reconsideration of the earlier denial of an extraordinary writ, GAC's last motion argued only that the trial court had violated the New Mexico Supreme Court's order of February 1, 1978, which directed the trial court to allow sufficient time for further motions to the State Supreme Court prior to the entry of a sanctions order.[14] Pet. No. 77-1269 at 29a. In this Court, however, GAC argues a different question:

> "The very least *the Due Process Clause* requires is the kind of procedure initially contemplated by the New Mexico Supreme Court, i.e., a disclosure of the proposed sanctions and a hearing, with appellate review before the sanctions are entered." Pet. No. 77-1269 at 15 (emphasis added).

Court stated that its decision rested on federal grounds, and this Court granted a second petition for writ of certiorari. See 434 U.S. —— (Oct. 31, 1977) (No. 76-1640).

By contrast with the instant matter, however, the New Mexico Supreme Court in that proceeding had issued the alternative writ sought by GAC, ordering the respondent to show cause why a writ of prohibition should not issue and ordering briefs and oral argument on the merits. Pet. No. 76-385 App. 7a. It was only after the filing of those briefs and oral argument that the court quashed the alternative writ as having been improvidently granted. Pet. No. 76-385 App. 9a; see No. 76-1640, slip op. at 3. The circumstances that justified a remand in that case are not present in the proceedings now under review. Even counsel for GAC, in the New Mexico Supreme Court, has referred to the January 11 action of that Court as "a *refusal* * * * *to consider* the question of whether this Order [the November 18 order of the District Court] was properly entered, whether this Order is constitutionally sound, whether this Order comports with due process * * *." Tr. 2/1/78 at 14-15 (emphasis added).

[14] GAC's contention (Pet. No. 77-1269 at 4-5), based upon a question during oral argument by a member of the New Mexico Supreme Court, that the February 1, 1978 order was intended to require the trial court to make any proposed sanctions available for review before filing, is refuted by that court's denial on March 2 of GAC's motion. See pp. 11-13 *supra*.

Leaving aside the absence of a single citation that supports this bizarre proposition of federal constitutional law, we note that the petition does not, as required by Supreme Court Rule 23(1)(f), "specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which," that federal question was raised.

The March 2, 1978 action of the New Mexico Supreme Court was like the action of January 11—a refusal to exercise its discretion to issue a show cause order and review on the merits, by extraordinary writ, issues reviewable on direct appeal. UNC pointed out in argument that, among other things, the court's rules do not provide for reconsideration of a denial of an extraordinary writ; GAC's motion was not verified as required by § 21-2-1(24)(2) of the New Mexico Statutes Annotated (1953); no irreparable injury had been demonstrated; and fact issues not appropriate for review by extraordinary writ were involved. Here, too, the court denied GAC's motion without opinion and declined to enter an alternative writ requiring the filing of the record, full briefing, and argument of the issues on the merits.

In short, the court's actions amounted to no more than a refusal to divert a complicated civil trial from regular appellate processes that would not be long delayed. These actions are quintessentially the kinds of decisions that should be presumed to have rested on independent and adequate non-federal grounds. Any other result would be a substantial federal interference with a State Supreme Court's right to save its power of issuing extraordinary writs for situations that in fact demand it.

B. The Federal Questions That GAC Presents are Insubstantial

The November 18, 1977 discovery order has now been superseded by the March 27 Amended Sanctions Order

and Default Judgment (only one of the premises of which is violation of the November 18 order). Yet GAC's petition in No. 77-1236 continues to seek review of that earlier interlocutory order. GAC argues that the order (a) violated the Due Process Clause as interpreted by this Court in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958); (b) unconstitutionally intruded upon United States foreign relations; and (c) violated the act of state doctrine. In its petition in No. 77-1269, GAC argues that the Due Process Clause, under *Societe Internationale*, required the trial court to disclose in advance any sanctions it intended to enter in order to permit state appellate review prior to the entry of such sanctions. None of these contentions poses a substantial federal question.

1. *The Societe Internationale Decision and the Due Process Contentions.* In *Societe Internationale*, a suit by a Swiss holding company against the Attorney General for the return of assets seized under the Trading with the Enemy Act, the district court dismissed the complaint for failure to produce foreign bank records in response to a production order under the Federal Rules of Civil Procedure. Petitioner argued that disclosure of the records would have violated Swiss law, and that therefore the district court had no power to order their production or dismiss the complaint. In Part I of its opinion, however, this Court upheld the discovery order, ruling that a contrary result would, in addition to undermining the policies of the Trading with the Enemy Act, "invite efforts to place ownership of American assets in persons or firms whose sovereign assures secrecy of records." 357 U.S. at 205. In short, the Court upheld the propriety of a production order in the face of precisely the same kind of argument that GAC makes in this case.

In Part II of its opinion, this Court held that Rule 37 of the Federal Rules of Civil Procedure authorized the District Court to impose sanctions for failure to comply

with a production order, even if the failure was not willful. "[W]illfulness or good faith" was relevant to the severity of the sanction, not to the power of the court to enter the sanction itself. 357 U.S. at 208.

In Part III, this Court considered the propriety of dismissal in the particular case as a Rule 37 sanction. It noted that a Special Master, the District Court and the Court of Appeals had determined that the petitioner had acted in good faith, and that a due process issue was posed by the dismissal of a complaint "because of a plaintiff's inability, *despite good-faith efforts*, to comply with a pretrial production order." 357 U.S. at 210 (emphasis added). In conclusion, the Court reversed and remanded, saying:

> "* * * Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." 357 U.S. at 212.

The teaching of *Societe Internationale* is clear and the actions of the New Mexico courts reflect a correct understanding of the decision: Even if compliance with an order compelling discovery may violate foreign law, that circumstance does not make the discovery order improper. The justifications for failing to comply with such an order are properly considered when the court is determining the appropriate sanction under Rule 37. And if the party refusing discovery has acted in good faith, then particularly severe sanctions, such as dismissal of a complaint, may be improper. In sum, a discovery order is no more than the necessary predicate to whatever sanctions may be appropriate.

The District Court's order of November 18, 1977, directed GAC to identify documents housed in Canada and, while it looked forward to the entry of sanctions

and established a briefing schedule for that purpose, it did not itself impose any sanctions. GAC's protestations that it could not produce or identify the Canadian documents without violating Canadian law, that it acted in good faith in attempting to obtain a release from or waiver of Canadian law, and that the due process concerns noted in *Societe Internationale* prevent the imposition of sanctions—all of these are relevant to the propriety of the Amended Sanctions Order and Default Judgment. But GAC admits that the sanctions order is not yet subject to review as a whole (see Pet. No. 77-1269 at 12), and no case cited by GAC holds that those concerns prevent the entry of the discovery order itself. While *Societe Internationale*, as we have seen, reversed a sanctions order, it held that the discovery order had been proper.

The only other decision with which GAC claims a conflict on the due process issue is *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977). In that case, the District Court had imposed a sanction (contempt) after making a finding of bad faith. The Court of Appeals held that the finding of bad faith was clearly erroneous and reversed. Rather than supporting GAC's argument that good faith and adequate justification prohibit the entry of discovery orders involving foreign documents,[15] the case holds that such issues are relevant only to the severity of sanctions imposed. The court said:

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[15] GAC suggests a conflict with *Societe Internationale* and *In re Westinghouse Electric* on the grounds that GAC, like the parties opposing discovery in those cases, acted in good faith (see Pet. No. 77-1236 at 19). The factual findings of the District Court are explicitly to the contrary, the New Mexico Supreme Court undertook no independent review of GAC's conduct, and GAC has conceded that such factual issues "will first have to be reviewed, upon a careful consideration of the full record, in the New Mexico appellate courts." Pet. No. 77-1269 at 12.

> "We do not regard our disposition of the present controversy to be in anywise at odds with *Arthur Andersen & Co.* v. *Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 * * * (1977). It is true that in that case we held that the district court had not abused its discretion in entering a discovery order which required Arthur Andersen to produce certain documents, notwithstanding the fact that by the act of producing such records, Arthur Andersen would violate Swiss law. However, * * * *we recognized the distinction made in Societe between the power to order discovery and the imposition of sanctions for noncompliance.* In *Andersen* we left open the question of the effect of foreign law when the district court is considering the sanctions to be imposed for disobedience to the court's discovery order." 563 F.2d at 999 (emphasis added).

GAC attempts to evade the prematurity of its argument based on *Societe Internationale* in No. 77-1236 by arguing that the November 18, 1977 order was in fact a sanctions order. Pet. No. 77-1236 at 18. It relies on the following single sentence in that order:

> "2. All facts provable from documents housed in Canada which are not produced and which are the subject of said motion are found against Defendant, [GAC,] and said defendant is precluded from offering evidence herein in opposition to such findings of fact; subject, however, to the other provisions of this order." Pet. No. 77-1236 App. 4a.

The "other provisions" of the order set a briefing schedule on the findings of fact to be entered as sanctions. By the time those briefs were due, UNC had moved again for default, and the briefs filed concerned many other discovery violations occurring both before and after the November 18 order. The trial on all issues continued after the entry of the November 18 order and until the March 2 Sanctions Order and Default Judgment. There

can be no question that the operative sanctions order in this case—the decision that contains the District Court's detailed recitals about GAC discovery failures and its lack of good faith—is the March 2 Sanctions Order and Default Judgment, as amended on March 27. The November 18 order, including any role it might have had in the final imposition of Rule 37 sanctions, was interlocutory in every sense of the word.[16]

In No. 77-1269, petitioner argues that the March 2 Sanctions Order and Default Judgment has "ripened GAC's argument beyond any contention of prematurity," Pet. No. 77-1269 at 15. Elsewhere, however, GAC states that the recitals and findings of fact in the March 2 order "will first have to be reviewed, upon a careful consideration of the full record, in the New Mexico appellate courts." *Id.* 12. Given GAC's acceptance of the District Court's findings of bad faith, its argument here necessarily is the following: that *Societe Internationale* precludes the entry of any sanctions order and default judgment, when the identification or production of documents would violate foreign law, even though the sanctions order is based on many other discovery failures in the "utmost bad faith," some of which preceded adoption of the foreign law; even though the court finds that the party refusing discovery has deliberately stored documents in the foreign country; and even though the court finds that the party failed to take adequate steps to produce or identify the documents without violating foreign law. *Societe Internationale* and *Westinghouse Electric* do not support such an argument and indeed support the contrary position.[17]

[16] We note that the November 18 order included findings that GAC's failure to produce was caused in part by its "deliberate policy of housing documents in Canada" and that GAC had "not performed or complied with," but rather had "avoided" a prior discovery order. See pp. 8-9 *supra*.

[17] For example, the Court in *Societe Internationale* said that whether a party has "deliberately courted legal impediments to production * * * would have a vital bearing" on the appropriate Rule 37 sanction. 357 U.S. at 209. It previously observed that petitioner had negotiated over a period of two years the release of over 190,000 of the foreign documents in question. *Id.* 203. Clearly the Court considered the overall good faith of petitioner to be an essential consideration. See also, *e.g.*, *Westinghouse Electric*, 563 F.2d at 998.

In any event, the Sanctions Order and Default Judgment was entered *after* the orders by the New Mexico Supreme Court that the petitions request this Court to review. It was not and could not have been passed upon in any way by the New Mexico Supreme Court in issuing those orders.[18] Hence, there is no basis whatsoever for this Court in effect to review that Sanctions Order and Default Judgment on petition for writ of certiorari to the January 11 and March 2 orders of the New Mexico Supreme Court.

GAC's petition in No. 77-1269 principally presents another due process argument which it appears to infer from *Societe Internationale*: that the Due Process Clause requires the trial court to disclose in advance the sanctions that it intended to enter, to permit state appellate review prior to the entry of the sanction. Neither *Societe Internationale* nor *Westinghouse Electric* addressed such a novel contention. No federal or state court of which we are aware follows such an extraordinary procedure, and it seems obvious that it is not mandated by the Constitution. In general the Constitution does not require a state to provide any appellate review, *Ortwein* v. *Schwab*, 410 U.S. 656, 660 (1973), and "an appeal after the entry of judgment" by a trial court undoubtedly is sufficient to comply with the Constitution. *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932). See *Valley Bank of Nevada* v. *Skeen*, 366 F. Supp. 95, 98 (N.D. Tex., 1973),

[18] Indeed, at oral argument before the New Mexico Supreme Court on March 1, 1978, counsel for GAC stated that "[t]he only question before this Court is the validity of the November 18 order which has been reaffirmed twice." Tr. 3/1/78 at 13.

aff'd without opinion, 495 F.2d 1371 (5th Cir., 1974) (default judgment).[19]

2. *Interference with United States Foreign Relations.* The remaining questions presented by GAC may be dealt with briefly. GAC's argument that the November 18, 1977 discovery order unconstitutionally intruded upon United States foreign relations rests essentially on *Zschernig* v. *Miller*, 389 U.S. 429 (1968). That case is very different from this one. There the Court found that, under the

[19] In the paragraph preceding the Conclusion of the petition in No. 77-1269, GAC suggests that "[a]lternatively, in the unusual circumstances of this case, a common-law writ of certiorari, under 28 U.S.C. § 1651, directly to the trial court would be appropriate" to review the March 2 Sanctions Order and Default Judgment. That suggestion should be rejected out of hand. GAC has not even complied with the requirement in Rule 31(1) of this Court that petitions seeking the issuance of an extraordinary writ under 28 U.S.C. § 1651 "shall be prefaced by a motion for leave to file such petition" or with the requirement in Rule 31(2) that a petition for a common-law writ of certiorari "shall set forth with particularity why the relief sought is not available in any other court * * *." GAC could not comply with the latter requirement, as it clearly has a remedy by appeal to the New Mexico appellate courts and thereafter by petition for writ of certiorari under 28 U.S.C. § 1257(3) from the final judgment of the highest state court. Indeed, GAC has presented no argument at all as to why a common-law writ of certiorari is appropriate other than the bare citation of a few decisions by this Court, none of which involved entry of a default judgment or other circumstances at all comparable to those involved here. The only cited case which involved a common-law writ of certiorari, *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196 (1945), makes clear that the role of the writ is "to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so," and even then that the writ "may not be used as a substitute for an authorized appeal * * *." 325 U.S. at 202, 203. There is no question about the jurisdiction of the New Mexico District Court to enter a sanctions order and default judgment for violation of discovery orders, as such jurisdiction is expressly conferred by Rule 37 of the New Mexico Rules of Civil Procedure. At most, any issues raised by GAC here or below go to the appropriateness of that court's exercise of its jurisdiction, and if any errors have been committed GAC has the remedy of an appeal.

Oregon inheritance laws and similar laws in other states, probate courts had "launched inquiries into the type of governments that obtain in particular foreign nations," 389 U.S. at 434, leading to "minute inquiries concerning the actual administration of foreign law, [and] into the credibility of foreign diplomatic statements * * *." *Id.* at 435. It found this intrusion into the federal domain too great.

Neither UNC nor I&M sought an adjudication of the legality of any act of the Canadian government, and no such adjudication has been made in this case. UNC has merely sought a fair trial of, and thus discovery relevant to, its claims that GAC and Gulf have conspired with other private uranium producers to fix prices, to monopolize uranium reserves in New Mexico, and to eliminate UNC as a competitor. Evidence of the uranium cartel is also relevant to the issues of fraud, economic coercion, breach of fiduciary duties, and commercial impracticability raised by UNC in its complaint, as well as the antitrust issue. That evidence is further relevant to UNC's defense to GAC's counterclaim, which sought specific performance of its supply contracts with UNC and alleged that UNC had violated the New Mexico antitrust law. In requiring such discovery, and in eventually imposing sanctions for GAC's bad faith evasion of discovery orders, the District Court did not transgress upon the conduct by the United States of its foreign relations. Certainly, neither *Zschernig* nor any other case of which we are aware supports the contrary proposition.

In any event, the November 18 discovery order that GAC attacks in the petition in No. 77-1236 cannot be considered apart from sanctions imposed for violation thereof; yet the only sanctions order outstanding in the case is the March 27 Amended Sanctions Order and Default Judgment, now the basis of a final declaratory judgment. Those later judgments were not passed upon by the New

Mexico Supreme Court in the orders that GAC seeks to have reviewed, and GAC concedes that the recitals and findings in the Sanctions Order and Default Judgment "will first have to be reviewed, upon a careful consideration of the full record, in the New Mexico appellate courts." Pet. No. 77-1269 at 12. *Societe Internationale* upheld a discovery order similar to those issued in this case, and held that good faith on the part of the party refusing discovery requires amelioration of Rule 37 sanctions. Here, however, the trial court has found the "utmost bad faith" in GAC's whole course of conduct in discovery in this case—including that GAC deliberately stored documents in Canada, failed to produce Canadian documents while it was legal to do so, and failed to take adequate steps to identify the documents without violating Canadian law. See pp. 13-15 *supra*.

GAC has cited no case—from this Court or any other—that stands for the proposition that a state court discovery order unconstitutionally interferes with foreign relations or that a sanctions order based on recitals like those found in this case so interferes. Accordingly, there is no reason for consideration of these issues by this Court.

3. *The Act of State Doctrine.* GAC argues that the District Court "totally discounted a criminal law enacted and enforced on Canadian territory by the Canadian government," and is "questioning the legality of an arrangement [the cartel] enforced on Canadian territory" (Pet. No. 77-1236 at 14, 15), all in violation of the act of state doctrine. The argument mischaracterizes the actions of the District Court and misconstrues the act of state doctrine.

The New Mexico courts have not sat "in judgment on the acts of the government" of another country. *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 691 n. 7 (1976); *Underhill* v. *Hernandez*, 168 U.S. 250, 252

(1897). The District Court has simply entered discovery orders, and eventually imposed sanctions for the violation of such orders, in regard to discovery of information relating to a cartel arrangement among private companies. Moreover, the act of state doctrine does not apply to extraterritorial acts of governments, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), and the cartel operated in the United States, including New Mexico, as well as in other countries.

In any event, GAC's principal concern must be with the findings of fact concerning the cartel, included as sanctions in the Amended Sanctions Order and Default Judgment, which has not yet been reviewed in the state appellate courts. There is no good reason to short-circuit that appellate process.

Moreover, the trial court, rather than disregarding a Canadian criminal law, demonstrated over and over again its concern for the problem posed to a fair trial between UNC and GAC by the Canadian Uranium Security Regulations. The trial court followed the course laid out in *Societe Internationale* and issued a sanctions order only after lengthy findings that GAC had acted in the utmost bad faith throughout the course of discovery. GAC cites not a single decision of any court that supports the proposition that a severe sanction in these circumstances violates the act of state doctrine.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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April 17, 1978.

APPENDICES

APPENDIX A

STATE OF NEW MEXICO
COUNTY OF SANTA FE
IN THE DISTRICT COURT

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

AMENDED SANCTIONS ORDER AND DEFAULT JUDGMENT

[Entered March 27, 1978]

This matter coming before the Court upon motions for sanctions and for the granting and entry of default judgments against defendant, General Atomic Company, for its failure to comply with discovery laws and orders of the Court, a motion for an evidentiary hearing upon part of the motions relating to requested sanctions, responses to the aforesaid motions, supporting affidavits and documents, and argument and authorities made and submitted by the various parties; the Court having given due study and consideration to all of the foregoing, and to the whole record and history in this litigation, including all hearings conducted on discovery questions throughout the period from December 31, 1975, to the present; the Court having further reviewed all relevant pleadings, interrogatories and answers thereto, and other relevant and credible documents and materials in this case, as well as pleadings in other related court cases; based upon all of the foregoing, this Court now concludes that the defendant, General

Atomic Company, has followed a conscious, willful and deliberate policy throughout this litigation, which continues to the present time, in cynical disregard and disdain of the Rules of Procedure relating to discovery and this Court's discovery Orders, of concealing rather than in good faith revealing the true facts concerning the international uranium cartel in which Gulf Oil Corporation was involved and which through its subsidiaries, officers, agents and affiliates, including defendant, GAC, participated, from an as yet undetermined time, but for not less than from and during 1972 into 1975; the aforesaid policy of defendant, GAC, of hiding that information from the Court and opposing counsel, and in consequence thereof, the exercise of the utmost bad faith in all stages of the discovery process up to the present time, leads the Court to the inescapable conclusion that at this late date, the Court's discovery Orders will not be complied with by the defendant, GAC, and that this Court is powerless to secure unto all parties to this case either due process of law or a fair trial based upon equality and parity of right and duty unless sanctions under Rule 37 are imposed by the Court at this time. To require the other parties to this case to proceed further upon the trial on the merits at this time, other than upon a consideration of damages, disadvantaged as they are by the lack of discovery and GAC's failure to provide discovery, would result in a grave injustice unto all parties to this action other than GAC and a cynical denial of equal protection of the law unto them; the factual basis for imposing sanctions under Rule 37 appears from and is documented by the "Recitals" which are hereinafter set forth, which manifestly appear from the face of the record herein, without any need or requirement for an evidentiary hearing or other form of additional delay in giving effect to Rule 37, to-wit:

RECITALS

(1) On December 31, 1975, United Nuclear Corporation, plaintiff herein, by motion and leave of the Court, filed its First Set of Interrogatories to General Atomic Company in this action. Those Interrogatories were identical in scope to UNC's interrogatories filed in Cause No. 50044, Santa Fe County District Court. The definition section of those interrogatories filed herein, as well as certain questions, specifically requested information from the constituent partners of GAC, Gulf Oil Corporation and Scallop Nuclear, Inc. Those definitions were not objected to within the time allowed by Rule 33 of the New Mexico Rules of Civil Procedure, and, indeed, were never objected to by GAC.

(2) In UNC's First Set of Interrogatories, UNC asked, *inter alia*, that GAC:

> "32. Identify all agreements and all past, pending or contemplated negotiations of the partnership or the partners, directly or indirectly pertaining to the processing of uranium-bearing ores into U_3O_8 the conversion thereof into UF_6 or any other form, and the marketing and sale of all such uranium-bearing products.
>
> "34. Identify all studies, evaluations, projections and other data pertaining to uranium ore reserves, the mining and milling thereof, the further processing and conversion of uranium and the marketing and sale of all such uranium products."

Such information was relevant and material to the repeated allegations in UNC's Complaint that the 1973 Uranium Supply Agreement and 1974 Uranium Concentrates Agreement were executed in violation of § 49-1-1 and 49-1-2 NMSA 1953 of the New Mexico antitrust statutes.

As to UNC's First Set of Interrogatories, GAC requested and received an extension of time in which to respond.

(3) GAC neither answered nor objected to the Interrogatories within the time allowed, and UNC filed its First Application for Default Judgment on March 10, 1976. On March 12, 1976, the parties entered into an Agreement signed by counsel for UNC, GAC and Gulf Oil Corporation in which UNC agreed to withdraw its Application for Default Judgment, and GAC agreed to "answer in good faith all interrogatories to Defendant presently pending in this action," and to produce documents. No objection was made to the fact that information concerning Gulf Oil Corporation was requested, or that Gulf Oil Corporation was obligated by the terms of this Agreement to produce relevant documents. The agreement between the parties expressly referred to "Gulf Correspondence" as one category of documents which GAC agreed to provide. Said Agreement was entered into with Gulf Oil's knowledge and approval, its attorney having executed same.

(4) The documents generated by the cartel's Secretariat, telexes by the Secretariat, documents of the Canadian producers' group, as well as internal Gulf documents concerning the cartel were, at the time of the March 12, 1976 Agreement, subject to UNC's Interrogatories and the Agreement to produce. At that time, most or all of these documents were in the files and custody of Gulf Minerals Canada, Limited, a wholly owned subsidiary of Gulf Oil Corporation, and included within the scope of UNC's First Interrogatories, in Canada, and no law of the United States or Canada prohibited their production.

(5) Rather than answering the Interrogatories fully, or producing the Gulf cartel documents which was within the ambit and requirement to furnish of its March 12, 1976 Agreement, GAC instead filed on April 2, 1976

wholly inadequate and evasive answers to the Interrogatories. In response to UNC's interrogatory No. 69 (first set) which asked GAC when the business records of Gulf and Scallop would be produced for inspection and copying, GAC, under oath answered that it would produce those records for inspection and copying on June 20, 1976.

(6) In response to GAC's Motion to Stay Further Proceedings, this Court held on April 30, 1976, that the "parties are bound by their agreements," and that GAC was obligated to provide full discovery as contemplated by the March 12, 1976 Agreement.

(7) From March 12, 1976, forward, GAC neither identified nor produced cartel documents or information in the possession of Gulf Oil Corporation and its subsidiaries, despite its Agreement to do so, and the Order of the Court on April 30, 1976, that it comply with that Agreement.

(8) On August 6, 1976, UNC filed its Second Motion for Default Judgment for GAC's failure to answer UNC's Interrogatories propounded on December 31, 1975, and its failure to abide by the March 12, 1976 Agreement and the Court's April 30, 1976 Order. In response to that Motion, GAC represented to the Court that "complete and full effort has been made to cooperate with the demands of Plaintiffs in document discovery and such attempts have gone fully beyond any good faith requirements by the Rules of Civil Procedure or agreement of the parties."

(9) From December 31, 1975, the date UNC's Interrogatories were filed in this case, through September 23, 1976, the date the Canadian government passed the Uranium Security Regulations, GAC never informed this Court or UNC about the existence of the international uranium cartel; Gulf Oil Corporation's participation therein; or about the Gulf documents relating thereto in Canada.

(10) Despite its agreement and this Court's Order to produce Gulf documents, GAC willfully, intentionally and in bad faith covered up the fact of Gulf Oil Corporation's participation in an international uranium cartel from at least 1972 into 1975, which include years in which it was in a joint venture with UNC, viz., Gulf United Fuels Corporation (GUNF). GAC thereby deliberately concealed the existence of evidence which it knew to be highly relevant to the antitrust issues pleaded in UNC's Complaint and stressed by counsel throughout the discovery period. This intentional and willful action was a violation of UNC's discovery rights and the Orders of this Court.

(11) The Court repeatedly has warned that all parties are obligated to make full disclosure in good faith to discovery requests. On several occasions since the beginning of litigation, the Court has told all parties that it expected a good faith, non-evasive and full compliance with discovery. The Court also warned on November 30, 1976, and again on March 3, 1977, that it would apply sanctions provided under Rule 37 of the New Mexico Rules of Civil Procedure for *any party's failure to make discovery in good faith.*

(12) UNC's Second Set of Interrogatories, the discovery subject matter of which also was clearly within the ambit and requirement of its First Set of Interrogatories filed on December 31, 1975, were served on August 16, 1977. A good faith, non-evasive response by GAC to said First Set of Interrogatories would have, in whole or in part, eliminated the necessity for the Second Set of Interrogatories. The Second Set of Interrogatories requested full disclosure and commitment to a set of specific facts by GAC concerning its and Gulf's cartel activities, and requested identification of all documents relevant to each interrogatory.

(13) UNC also filed a Motion to Produce all documents identified in GAC's Answers to Interrogatories on August 16, 1977.

(14) GAC objected to UNC's Second Interrogatories on August 23, 1977, most of which objections were overruled. On September 9, 1977, this Court held a hearing on additional objections by GAC to UNC's Second Set of Interrogatories, most of which were also overruled. GAC was ordered to answer by September 20, 1977. In a hearing before the Court on September 20, 1977, counsel for GAC requested an extension of time in which to answer said Interrogatories on the ground that the extension would enable counsel to provide "full and good faith" answers to the Interrogatories. The extension was granted, and on September 26, 1977, GAC filed its first Answers to UNC's Second Set of Interrogatories.

(15) GAC's first Answers consisted in a large measure of a "do-it-yourself" kit, merely directing UNC to deposition pages from which it was supposed to discover the answers to its interrogatories. This Court, on October 11, 1977, held that GAC's Answers were "defective, incomplete, inadequate and unacceptable." GAC was again ordered to answer the Interrogatories, and to give full and good faith discovery.

(16) On October 20, 1977, GAC filed its Second Answers to UNC's Interrogatories. Those "Answers" excluded all information contained in the Gulf documents in Canada, and did not identify the documents as GAC had been ordered to do on October 11, 1977.

(17) On December 9, 1977, Indiana and Michigan, Detroit Edison and UNC joined in moving to compel further answers to UNC's Second Set of Interrogatories.

(18) After consideration of all briefs filed by GAC and others, this Court held that the answers made and filed by GAC to date had not complied with the Court's

orders to make complete, good faith, and non-evasive answers to UNC's Second Set of Interrogatories. The Court therefore again ordered GAC "completely, in good faith, and without evasion" to answer each of the interrogatories enumerated in Finding No. 3 of the Court's December 27, 1977, Order. The Court also specifically gave notice in its December 27, 1977, Order that if GAC failed or refused to comply with that Order of the Court, any aggrieved party could apply to the Court for appropriate relief under Rule 37.

(19) GAC obtained from the Court two extensions of time in which to answer UNC's Interrogatories, and filed its Second Supplemental Answers on February 1, 1978. The Court has examined the answers so filed and finds them unresponsive and evasive to the questions asked, and mere legal argument in many of such answers. The series of Interrogatory Answers filed by GAC, after six months shows disdain for this Court's Orders that all parties make good faith discovery. Those answers so filed, coupled with what had gone before them, constitute, in effect, obstruction of justice, and demonstrate a willful deliberate and flagrant scheme of delay, resistance, obfuscation and evasion in discovery matters.

(20) The latest answers filed by GAC also violate the express terms of the Court's Order of October 11, 1977, wherein the Court held that the deposing party is entitled to obtain from the deponent party a commitment to a set of facts, posture or position on the subject matter of the Interrogatory. Rather than committing to a set of facts, GAC instead simply has stated that various cartel documents cited by I & M, which GAC had failed to mention in its Second Answers, "purport to" reflect certain events. GAC steadfastly has refused and refuses to admit that such events took place, or to state the true facts concerning the cartel, and Gulf's participation in it.

(21) By reason of the entire history relating to the manner of fulfilling its discovery requirements since the filing of UNC's First Set of Interrogatories on December 31, 1975, the Court concludes that it is hopeless to expect that GAC will in "good faith and without evasion" comply with the discovery requirements of the New Mexico Rules of Civil Procedure or this Court's Orders. GAC has willfully, intentionally, deliberately and in bad faith, failed and refused to answer UNC's Second Set of Interrogatories. UNC and the other parties to this suit have been irreparably prejudiced by this failure. Any party to any civil action is entitled to have and rely upon good faith discovery in the preparation and presentation of its case in chief and not at the end of the trial on its merits when such discovery is of little or no value to such party. If there can be any sanctions for non-discovery and if Rule 37 has any meaning, a party unlawfully deprived of discovery is entitled to those sanctions early and as a part of its case in chief and not at the end of the trial on its merits, whereby the innocent victim party would suffer the jeopardy of a motion for dismissal under Rule 41 (or for a directed verdict) without having the discovery to or sanctions to counter such a motion. It is now too late to expect answers or discovery in time to serve the purposes of the discovery rules and the Rules of Civil Procedure. This Court, in the interests of justice and fairness to all parties, and in order to enforce equality within the judicial process, must, at this time, apply appropriate sanctions for non-discovery specifically provided for in Rule 37 of the New Mexico Rules of Civil Procedure.

(22) GAC is under a duty to produce all documents to UNC which are or may be relevant to any of the Interrogatories asked in UNC's First Set of Interrogatories and even more particularly delineated and asked in UNC's Second Set of Interrogatories, including but not

limited to any documents relevant under questions 30 through 34 of the First Set of Interrogatories.

(23) GAC has represented to the Court and to all parties on several occasions that UNC had all documents which were relevant to the cartel or other issues raised in UNC's Interrogatories.

(23-A) GAC, as well as all parties to this action has been under a continuing obligation to update answers to interrogatories and to continue to produce documents in this litigation as their existence became known. In early January, 1978, GAC produced additional cartel documents to the U.S. Grand Jury in Washington, D.C. and to Westinghouse Electric Corporation. GAC, in bad faith, failed to reveal the existence of these documents to this Court or to the parties to this case, until after UNC had learned of their existence from a third party and made a demand upon GAC.

(24) The facts hereinabove set forth display a pattern and practice of GAC and Gulf to conceal documentary evidence of Gulf's and GAC's anti-trust activities and to subvert the discovery processes of this Court. GAC has deliberately failed to produce highly relevant documentary evidence. GAC has deliberately failed to inform this Court and the other parties, in a reasonably timely manner, of actions taken by another court in another jurisdiction which had a direct bearing upon the existence and materiality of such evidence. On August 10, 1977, Judge Snyder entered an order de-privileging, making public and holding outside the scope of the attorney-client privilege, approximately 41 of the 84 documents turned over to him by Gulf Oil Corporation for inspection in the Federal District Court in Pittsburgh, Pennsylvania. Despite the fact that the same law firm which represents GAC in this action represented Gulf before Judge Snyder in the Federal case in Pittsburgh, this

matter inexplicably was not brought to this Court's attention promptly by GAC. GAC never accurately disclosed to the Court nor to UNC the existence of all 84 of the documents turned over by Gulf to Judge Snyder in the Westinghouse litigation. The existence of most of those documents was not disclosed to the Court or to UNC until over one year after they were called for by UNC's First Set of Interrogatories and the agreement of the parties on March 12, 1976. The existence of some of the Snyder documents was not disclosed by the Court or to UNC until after Judge Snyder held them to be public and outside the scope of the attorney-client privilege. It was not until after UNC brought the matter of the Snyder order up in open court on October 7, 1977 and this Court's subsequent order that GAC first identified and turned over to UNC some of the Snyder documents. The failure to reveal the existence and identity of all of the Snyder documents in a timely manner in this case, was a deliberate attempt to further conceal the existence and identity of that evidence and avoid turning relevant documents over to parties to this litigation in compliance with lawful discovery demands.

Based on all facts, the Court is forced to conclude, therefore, that GAC has followed a consistent pattern and practice of concealing, rather than revealing, highly relevant documents to the Court and to the parties here, and that such actions and practices have been contumacious, intentional, willful, deliberate and, in the utmost bad faith.

(25) Within the ambit and requirement of its First Set of Interrogatories, filed on December 31, 1975, UNC's Second Set of Interrogatories with even more particularity and specificity ask, in almost every question, for the separate identification of documents relating to the subject matter of each separate interrogatory, and production of all documents so identified. In GAC's First

Answers to such Second Set of Interrogatories, filed on September 26, 1977, no identification of documents was made and virtually no documents were produced, despite UNC's clear request for such identification and production.

(26) In its October 11, 1977, Order, the Court required and ordered GAC to "separately, clearly and definitively identify all documents, where such identification is requested, whether such documents be housed only in Canada, only in the United States, in both countries or elsewhere."

(27) Rather than identifying the documents, GAC instead wrote a Canadian Minister asking if it could get permission to reveal "a summary of contents" of the documents. As this Court held on November 18, 1977, the Court's October 11, 1977, Order did not specify that a "summary of contents" be stated as part of the identification of documents. The Court's Order of October 11, 1977, to identify documents was not performed or complied with, but, rather, it was sought to be avoided, and willfully and deliberately violated by GAC.

(28) GAC next wrote a letter to a Canadian Minister who has been determined by the courts of Canada to have no authority to interpret or deal with the Uranium Security Regulations. Nevertheless, in full knowledge that the Minister to whom it wrote had no legal authority to interpret the Regulations, GAC asked and waited for his interpretation as to whether he thought it could identify documents in accordance with the Court's October 11 and November 18, 1977, Orders. A letter was received from the Canadian Minister saying he had no authority to interpret the Regulations, but that in his personal opinion, the Regulations did not allow identification.

(29) The Canadian Security Regulations on their face prohibit only revealing "contents or information contained

in" cartel documents in Canada. A reasonable interpretation of that language, and this Court so reads it, would mean that simple identification, giving the date of the document, the author, addresses, and general subject matter, would not violate the law of Canada because the "contents or information" contained in the document itself would not be revealed.

(30) Nevertheless, GAC has refused to comply with the Order of this Court also concerning identification of the Canadian documents. As of this date, GAC has not identified the documents in Canada for the benefit of the Court and the parties nor has it even stated or disclosed the number of documents housed in Canada, thereby following its established practice of concealing, rather than revealing, pertinent information.

(31) The Court's October 11, 1977, Order also required GAC to "take affirmative action and to exert all lawful effort reasonable and possible to bring about the production" of documents housed in Canada. In order to be held to have been acting in good faith, the Court said that GAC should "seek diligently dispensation from those Canadian laws so that it could lawfully produce documents to which such laws may pertain."

(32) GAC's response to this requirement that it take "all lawful effort reasonable and possible" (other than so late as February 22, 1978, to offer to take other counsel and the Court to Canada to talk to Canadian officials about production of documents, in person), was to write a simple letter to the Canadian Minister of Energy, Mines and Resources, asking if he would consent to release the documents in question. The Canadian government's answer was "no.".

(33) Actions taken by parties in similar cases in dealing with foreign governments which have imposed secrecy laws are instructive as to the standard of "good

faith" to be used in dealing with foreign governments to secure the release of documents. In *In Re Ampicillin Litigation*, in which Judge Sirica ordered that findings of fact be made against a party which refused to produce documents and because of a British secrecy law, the Defendant undertook diligent and long-term negotiations with the British government which ultimately resulted in the documents being released in their entirety.

(34) Similarly, in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), "good faith" in dealing with a foreign government over the release of documents was found only after the petitioner had negotiated for two years with the Swiss government, which resulted in the release of over 190,000 documents. In addition, petitioner there persuaded the Swiss government to allow a neutral third party agreed upon by petitioner and the Swiss government to inspect the documents and obtain the release of some of them.

(35) GAC's writing a simple letter to a Canadian Minister who has been declared by law to have no authority to interpret Canadian Security Regulations or to grant a dispensation therefrom does not constitute a "good faith" effort to secure the release of documents in Canada or the information contained in them. Neither GAC, nor Gulf Minerals Canada, Ltd., nor Gulf Oil Corporation has entered into any negotiations with the Canadian government, or taken any further action beyond writing a simple letter insofar as made known to this Court. Such action does not constitute the "good faith" and "diligent" effort to secure the release of the documents required by the Court's October 11, 1977, Order. In fact, GAC's actions demonstrate its actual intent to conceal the documentary evidence concerning the cartel rather than to produce it in good faith to the parties to this litigation and the Court.

(36) UNC filed a Motion on November 4, 1977, asking that this Court find all facts provable from the documents stored in Canada against GAC. The Court authorized the presentation of evidence at an evidentiary hearing.

(37) At the aforesaid evidentiary hearing, GAC put on evidence through an attorney with Howrey and Simon, who testified about the efforts made by that law firm to identify documents in answer to UNC's Interrogatories. GAC put on absolutely no evidence about how the documents came to be stored in Canada, or why they were there.

(38) UNC moved the admission at the evidentiary hearing of four separate statements by M. L. T. Gregg in his *Westinghouse (Richmond)* deposition. The admissibility of this deposition testimony was stipulated to by counsel for GAC on the record.

(39) Mr. Gregg's deposition testimony established that Gulf followed a deliberate policy of housing the cartel documents in Canada, rather than in the United States. His testimony also established that to the extent documents were in the United States, it was understood that they were to be stored in the offices of the Pittsburg law department, where they could be shielded by a claim of attorney-client privilege.

(40) It was on this uncontradicted factual record that the Court made its findings on November 18, 1977, that Gulf followed a conscious and deliberate policy of housing the cartel documents in Canada. That finding is reiterated here. Gulf's action in regard to storing cartel documents in Canada amounts to deliberately courting or seeking legal impediments to the production of the records.

(41) UNC has complied with GAC's discovery requests fully and in good faith insofar as anything in that regard

has been brought to the attention of or is known to the Court. No representation to the contrary has been made by any party hereto.

(42) All other parties to this litigation except GAC have also made good faith efforts at discovery, and have both produced documents and answered interrogatories in good faith.

(43) Based on the deposition testimony given by L. T. Gregg in this case, it is apparent that there are documents which presently exist in the files of Gulf Minerals Canada, Ltd. (a wholly owned subsidiary of Gulf) which are highly relevant to the antitrust, fraud and breach of fiduciary duty allegations by UNC in its Complaint and in its defense to GAC's Counterclaim. GAC has produced to the parties to this litigation only a small part of those documents. GAC's refusal to produce documents housed in Canada since December 31, 1975, was not based on inability to comply with production requests, but rather on bad faith refusal to produce.

(44) The cartel documents and records were clearly within the ambit and requirement of a good faith compliance with the initial discovery demands made herein by UNC in its First Set of Interrogatories on December 31, 1975, and numerous subsequent demands made prior to September 23, 1976, the effective date of the Canadian Uranium Information Security Regulations.

(45) Defendant, GAC, was in default and violation of its obligation to produce cartel documents from Canada and elsewhere in this case, prior to and long before September 23, 1976, wherein and whereby a good faith compliance with lawful discovery demands, their agreements and the Orders of this Court, would have produced in this case all of such cartel documents before there was a Canadian law or prohibition against so doing.

(46) The findings and recitals in the Court's Order of November 18, 1977, relating to discovery are adopted and incorporated herein by reference as a part of the "Recitals" of this Order. A copy of said Order of November 18, 1977, is hereunto attached.

(47) In this situation, GAC's failure to produce in good faith and failure to answer interrogatories in good faith has deprived UNC of a full and fair opportunity to cross-examine GAC's witnesses to defend against GAC's counterclaims for specific performance and damages; to rebut GAC's defenses to their claims; or on its case in chief to properly present United Nuclear's antitrust claims pleaded in the Complaint. Similarly, GAC's failure in discovery has deprived this Court of evidence which is indispensable to a proper and just adjudication of the issues in this case.

(48) The Court concludes that the only just and proper way to protect and secure due process rights to a fair trial for UNC, and the defendant, I & M is to impose sanctions under Rule 37 of the New Mexico Rules of Civil Procedure.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

A. The Court hereby adopts and imposes the following Rule 37 sanctions against the defendant, GAC, and in favor of the other parties to this case, adopted and found as fact because of the failure of defendant, GAC to comply with discovery Rules and the Orders of this Court, which failure the Court finds to be willful and deliberate, to-wit:

1. Gulf Oil Corporation (Gulf), Gulf General Atomic (GGA), Gulf Minerals Canada, Ltd. (GMCL), General Atomic Company (GAC), and Gulf Minerals Resources Company (GMRC), severally and as co-conspirators with

each other, and with other members and participants therein, participated in the formation and operation of an international conspiracy and cartel of uranium producers ("the cartel"), from at least 1972 to 1975. The purpose and effect of the cartel was to limit the supply, control production, allocate markets and fix the price of uranium.

2. The Canadian Government encouraged, but in no way required or mandated the membership of GMCL in the cartel. Neither Gulf, GGA, GMCL, GAC, nor GMRC, nor any of them, was ever compelled by the Canadian Government to participate in the cartel. GMCL would not have had the authority to join and participate in the cartel without authorization from responsible officers of Gulf, who were members of the so called "Executive", and who gave such authorization and sanction to the participation, actions and dealings of GMCL in the cartel.

3. GMCL is and was a wholly owned subsidiary of Gulf, and after GMCL joined the cartel, its members and members of the cartel Operating Committee had a number of meetings at various locales around the globe. At such meetings, the members of the cartel, including GMCL, agreed: (a) not to sell to middlemen, wherever located, or, alternatively, to do so only on highly discriminatory terms. Such middlemen included and were understood by both GMCL and Gulf to include both Westinghouse and Gulf United Nuclear Fuels Corporation (GUNF), and (b) to divide world markets (including the USA) and to fix the price of uranium. GUNF at all times was a corporation wholly owned by Gulf and UNC as a joint venture between them, and with Gulf holding majority ownership and management control thereof.

UNC and Gulf were under a fiduciary relationship, one to the other in their aforesaid joint venture creation, ownership and operation of GUNF. As fiduciaries, such owed to the other full disclosure of any information affecting or that might affect the operation and success of GUNF.

4. Said cartel agreements were carried out effectively; the world market price of uranium was fixed at artificially high levels by the cartel, and GUNF, a middleman, was greatly handicapped and damaged in its efforts to procure uranium.

5. Pursuant to an agreement with the cartel, Gulf, individually and with and through its divisions, affiliates and subsidiaries, including but not limited to GMCL, restricted and withheld production of uranium at Mount Taylor in New Mexico in order to limit the supply and control production of uranium in New Mexico, with the independent specific intent to monopolize New Mexico uranium reserves. The restriction of Mount Taylor production was and is a part and parcel of the aforesaid conspiracy by Gulf and by the cartel. Such restriction of production was a combination and attempt to monopolize as well as actual monopolization of New Mexico uranium reserves, and has constituted and constitutes a substantial adverse effect on New Mexico commerce.

6. Gulf and GAC executed the 1973 Uranium Supply Agreement and the 1974 Uranium Concentrates Agreement with United Nuclear Corporation (UNC) with the intent and as a part of an attempt, combination and conspiracy, engaged in by Gulf, GAC, their affiliates, divisions and subsidiaries, to monopolize New Mexico uranium reserves, and with the purpose and effect, in furtherance of the cartel conspiracy, to limit supply and control production and competition with the cartel from a New Mexico uranium producer. Both of the aforesaid contracts had and have as their object by Gulf and GAC, and do in fact operate, to restrict trade or commerce of a product of the mines of New Mexico, and have constituted and constitute a substantial adverse effect on New Mexico commerce.

7. Gulf and GAC executed the aforesaid agreements as a part of the attempt, combination and conspiracy engaged in by them, their affiliates and subsidiaries and the cartel to monopolize and the actual monopolization of New Mexico uranium reserves.

8. Gulf and GAC knew and intended that the cartel and its actions would and did in fact substantially raise the price of uranium in the United States of America domestic market, which did substantially and adversely affect New Mexico commerce.

9. Pursuant to a policy of secrecy and the cartel's directions, rules or requirements concerning secrecy, neither did Gulf, nor GAC, nor anyone acting for them, ever inform UNC or GUNF about their aforesaid participation in or the actions of the cartel, at anytime before the execution of or negotiations concerning the aforesaid 1973 and 1974 agreements. Gulf and GAC thereby breached any fiduciary duty it may have owed in the premises to UNC or to GUNF, or to both.

10. Pursuant to the cartel's express inclusion of the United States market and United States buyers in its price fixing scheme, Gulf, GMCL and GGA quoted uranium to United States utilities at cartel prices, and to GUNF at prices above cartel prices, with specific and predatory intent of injuring GUNF and UNC, thereby breaching any fiduciary duty in the premises owed to UNC and committing a predatory act against GUNF.

11. Motivated by inside knowledge of the cartel's existence, policies and actions and its plan to keep UNC's uranium locked up and out of competition with the cartel, Gulf refused to supply uranium to GUNF as it had led UNC and GUNF to believe it would do and refused to allow GUNF to purchase uranium on the open market, thereby breaching any fiduciary duty it may have owed to UNC.

12. The cartel viewed middlemen as serious competitors, and discriminated in price against them in order to eliminate them as competitors. Gulf Oil Corporation and General Atomic Company executed the 1973 and 1974 Uranium Supply Agreements with the purpose and effect of eliminating middlemen as competitors by keeping material off the market which they might purchase.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

A. Judgment by default, except upon the issues of damages, be and it hereby is entered and granted:

1. Unto United Nuclear Corporation upon its Complaint against General Atomic Company, and

2. Unto Indiana & Michigan Electric Company upon its Crossclaim against General Atomic Company.

B. The defenses of General Atomic Company to the Complaint of United Nuclear Corporation and to the Crossclaim of Indiana & Michigan Electric Company and its Counterclaim against United Nuclear Corporation and its Crossclaim against Indiana & Michigan Electric Company, be and they all hereby are stricken.

IT IS FURTHER ORDERED that the trial of this case on its merits continue and proceed upon determination of damages only, and such other matters as may now be appropriate in view of the granting of default judgments herein.

IT IS FURTHER ORDERED that the Court shall and hereby does reserve the prerogative to make and enter herein such other, further, additional or different findings, orders or judgments, and to do such acts and conduct such proceedings as may be necessary to give full effect

to the foregoing Sanctions Order and Default Judgments and to enforce justice between the parties hereto.

/s/ Edwin L. Felter
EDWIN L. FELTER
District Judge

APPENDIX B

STATE OF NEW MEXICO
COUNTY OF SANTA FE
IN THE DISTRICT COURT

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

ORDER

[Entered March 27, 1978]

This matter coming before the Court upon the Motion of the defendant, General Atomic Company, For Reconsideration, Clarification, Certification For Appeal and Stay, supplements to said motion and responses thereto, supporting affidavits and documents and memoranda of argument and authorities; the Court being fully advised in the premises, Finds:

1. Insofar as there are errors, omissions or inaccuracies in the Court's Sanctions Order and Default Judgment entered on March 2, 1978, those errors, omissions and inaccuracies, in the view of this Court, have been corrected by an Amended Sanctions Order and Default Judgment filed and entered simultaneously with this order.

2. Except to the extent that said Amended Sanctions Order and Default Judgment amends or modifies the original Sanctions Order and Default Judgment entered on March 2, 1978, and except for the possibility of entry

of rule 54(b) judgments on the issues of liability, the Court finds that the motion of the defendant, General Atomic Company, as supplemented, For Reconsideration, Clarification, Certification for Appeal and Stay is without merit and should be denied.

3. The Motion of defendant, General Atomic Company, For Leave to File Reply to UNC's and I & M's Responses to GAC's Motion for Reconsideration, Clarification, Certification for Appeal and Stay is without merit and should be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

A. Except to the extent that the Court's Amended Sanctions Order and Default Judgment, entered herein, modifies and amends the original Sanctions Order and Default Judgment, entered on March 2, 1978, and except for the possibility of entry of rule 54(b) judgments on the issues of liability, the motion of defendant, General Atomic Company, For Reconsideration, Clarification, Certification for Appeal and Stay, as supplemented, is denied.

B. The Motion of defendant, General Atomic Company, For Leave to File Reply to UNC's and I & M's Responses to GAC's Motion For Reconsideration, Clarification, Certification for Appeal and Stay is denied.

C. The Sanctions Order and Default Judgment entered herein on March 2, 1978, as amended and modified by the Amended Sanctions Order and Default Judgment, shall be and remain of full force and virtue.

/s/ Edwin L. Felter
EDWIN L. FELTER
District Judge

APPENDIX C

STATE OF NEW MEXICO
COUNTY OF SANTA FE
IN THE DISTRICT COURT

No. 50827

UNITED NUCLEAR CORPORATION, a Delaware corporation,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

DECLARATORY JUDGMENT AS TO ISSUES BETWEEN UNITED NUCLEAR CORPORATION AND GENERAL ATOMIC COMPANY

[Entered April 4, 1978]

This matter having come before the Court for the entry of its final declaratory judgment pursuant to the provisions of the Declaratory Judgment Act.

And it appearing to the Court that on March 2, 1978 the Court made and entered a Sanctions Order and Default Judgment by which, for the reasons therein stated, separate and independent sanctions consisting of Findings of Fact, a Default Judgment and the striking of its Answer and Counterclaim, were imposed upon General Atomic Company and in favor of United Nuclear Corporation pursuant to Rule 37 of the New Mexico Rules of Civil Procedure. Said Sanctions Order and Default Judgment thereafter was modified in certain respects and as so modified should be, and hereby is approved and confirmed and the case is ripe for the entry of judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AND IT IS THE DECLARATORY JUDGMENT OF THE COURT THAT:

A. The 1973 Uranium Supply Agreement executed on September 12, 1973, as of June 10, 1973 between United Nuclear Corporation, Gulf Oil Corporation and Gulf United Nuclear Fuels Corporation is null, void, unenforceable and of no effect whatever and performance thereunder is excused.

B. The Uranium Concentrates Agreement between United Nuclear Corporation and General Atomic Company dated June 28, 1974, is null, void, unenforceable and of no effect whatever and performance thereunder is excused.

C. General Atomic Company is obligated to idemnify and save United Nuclear Corporation harmless from any and all claims, causes of action, liabilities, obligations, damages, costs and expenses arising out of, or in any way connected with or relating to the latter's failure to deliver or perform under the aforesaid 1973 Uranium Supply Agreement or any other contract with an electric utility company covered by or related to said agreement.

D. General Atomic Company's defenses to United Nuclear Corporation's First Amended Complaint, as set forth in its Answer and in the Pre-trial Order, should be, and they hereby are, stricken and held for naught.

E. General Atomic Company's Counterclaim against United Nuclear Corporation and each and every count thereof, as stated in said Counterclaim and in the Pre-trial Order should be, and is hereby, stricken and held for naught.

F. United Nuclear Corporation has no obligation to General Atomic Company or its predecessors in interest in respect to the sale or delivery of uranium in any form.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court having decided to make formal disposition of the remaining damage issues at a later time, nevertheless determines as contemplated by Rule 54(b)(1) of the New Mexico Rules of Civil Procedure that there is no just reason for delay in the entry of this final judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff, United Nuclear Corporation, recover its costs herein to be taxed by the Clerk in the manner prescribed by law.

/s/ Edwin L. Felter
EDWIN L. FELTER
District Judge